SUPREME COURT, U. S.

JAN 4 1969

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Supreme Court of the United States

October Term, 1968.

No. 769

CITY OF AMARILLO, AMARILLO INDEPENDENT SCHOOL DISTRICT, ET AL.,

Petitioners,

versus

W. S. EAKENS and LLOYD KING, Reorganization Trustees,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION.

Petitioners City and School Taxing authorities seek to avoid the plain language of the 1966 amendment to the Bankruptcy Act, which gives bankruptcy courts the power to "hear and determine . . . any question as to amount . . . of any unpaid tax." 11 USCA Section 11(a)(2A). The State of Texas and Potter County, apparently recognizing the plain meaning of this statute, did not appeal from the Referee's Order.

Even before enactment of the new statute, most courts had held that when a taxing authority filed a

claim, the bankruptcy court had the same power to pass on this claim as it had with respect to other claims. See e.g., *Henderson County vs. Wilkins,* 43 F.2d 670 (CCA 4, 1930); *In Re: White Star Refining Co.,* 74 F.2d 269 (CCA 5, 1934); *In Re: Lasky,* 38 F. Supp. 24 (N.D. Alabama 1941).

Approval of this position is indicated in *New Jersey vs. Anderson,* 203 U.S 483, 27 Sup. Ct. 137 (1906), where this Court holds:

> "Generally speaking, therefore, we think that a bankruptcy court has the power to redetermine tax claims in the exercise of its jurisdiction under the Chandler Act."

The reason for upholding the power of the bankruptcy court to pass on tax claims filed in a bankruptcy proceeding was clearly stated in *In Re: Chicago Railways Co.,* 175 F.2d 282 (CCA 7, 1949, cert. denied). The Court's language is:

> "It is fundamental of the bankruptcy law that he who invokes the aid of the bankruptcy court by offering a proof of claim and demands its allowance must abide by the consequences of that procedure . . . The whole process of proof, allowance and distribution is, shortly speaking, an adjudication of interest claimed in a res. It is nonetheless such because the claim is rejected in toto, reduced in part, given a priority inferior to that claimed, or satisfied in some way

> other than payment in cash. When the State becomes the actor and files a claim against the fund it waives any immunity which it might otherwise have had respecting the adjudication of the claim."

The only limitation upon this power was that where the state appellate processes had been utilized the bankruptcy court could not have another trial on the matter. *Arkansas Corporation Commission vs. Thompson*, 313 U.S. 131, 61 S. Ct. 888, 85 L.Ed. 1244 (1941).

The *Arkansas Corporation Commission* case, *Id.*, from which Petitioners quote and upon which they rely, was a railroad reorganization proceeding under Section 77 of the Bankruptcy Act. The precise issue before this Court was whether the reorganization court could determine questions concerning the amount of state taxes which had accrued during the bankruptcy proceedings, and which the Trustees had contested before the state quasi-judicial tribunal. The railroad had been in reorganization proceedings since 1933; the taxes involved were for the year 1939. The trustees had followed state statutory procedure in contesting the assessments—hence the court's language about "two trials." In the case at bar, no attempt was made to have the Court determine any issue concerning taxes accruing after bankruptcy, or taxes which were contested before any competent State tribunal. Indeed, the Referee correctly declined to reduce the taxes for the years in which there had been such contests.

Before the passage of the 1966 amendment to the Bankruptcy Act, some decisions questioned the authority of the bankruptcy court to pass upon the amount of taxes claimed to be due. See e.g., *Bauman vs. Sheehan,* 140 F.2d 747 (CCA 8, 1944); *In Re: B & L Farms,* 184 F. Supp. 801 (S.D. Fla. 1960). The 1966 amendment negates these decisions and expressly confers jurisdiction to hear and determine the amount of tax claims where the bankrupt has not pursued state appellate remedies.

A comparison of the new statute with the old one demonstrates the fallacy of Petitioners' position. The pertinent part of 11 USCA 104(a)(4) read, before the 1966 amendment, as follows:

> "*Section 104(2)*: The debts which are to have priority . . . shall be . . . (4) taxes which become legally due and owing by the bankrupt to the United States or to any state or subdivision thereof . . . and provided further that if any question arises as to the amount or legality of such taxes, such question shall be heard and determined by the Court."

The new Section 2-A (11 USCA Section 11(a)(2A)) enlarged the jurisdiction of the bankruptcy courts by giving them the power to:

> "Hear and determine . . . any question as to amount or legality of any unpaid tax, whether or not previously assessed, which has not prior

> to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction . . . " 11 USCA, Section 11(a)(2A).

A comparison of the foregoing provision demonstrates the enlargement of power granted by new Section 2-A. The priority provision of Section 104(a) was not, as erroneously stated by Petitioners, "simply transferred" to Section 2-A. It was not transferred at all. Section 2-A is completely new. The new section is contained in the jurisdiction section of the Bankruptcy Act rather than in the priority section.

In clarifying the power of the bankruptcy court to determine questions as to the amount of taxes, the new amendment codified the limitation which this Court stated in the *Arkansas Commission* case. The 1966 amendment provides that the bankruptcy court can determine questions as to the amount or legality of any tax "whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a competent judicial or administrative tribunal." 11 USCA Sec. 11(a)(2A).

If Congress had not intended that the bankruptcy court have the power to hear and determine questions as to the amount of the bankruptcy taxes when the assessments had not been contested, then the above quoted language of Section 2-A is completely meaningless. It is elementary that Congress is presumed to have intended its statutory language to have

meaning; and since the contention of Petitioners would render new Section 2-A meaningless, their contention cannot be accepted.

The Referee, as affirmed by the District and Circuit Courts, found that the tax claims filed by Appellants were, except to the extent allowed, grossly excessive. It is the law in Texas that a court of equity may intervene and set aside a tax based upon "grossly excessive" assessments, the "reasonable market value being the criterion for determining whether the assessment was 'grossly excessive' ". *Warren Independent School District vs. Southern Neches Corp.,* (Tex. Civ. App. 1965) 405 SW2d 100 at 103, writ ref. nre. at 404 SW2d 809 (Texas, 1966) following *State vs. Houser,* 138 Tex. 28, 156 SW2d 968 (1941); See also *Rowland vs. City of Tyler,* (Tex. Com. App. 1928), 5 SW2d 756 citing *Lively vs. MKT Ry. Co.* 102 Tex. 545, 120 SW 852 (1909); *City of El Paso vs. Howze,* (Tex. Civ. App. 1923) 248 SW 99; *Porter vs. Andrews,* (Tex. Civ. App. 1923) 253 SW 870; 54 Tex. Jur. 2d 295 et seq., and cases cited.

Therefore, the issue before the Referee was whether the taxes were based upon excessive assessments.

The taxing authorities assessed the bankrupt's forty-year-old, non-air-conditioned hotel at nearly $1,000,000. The credible evidence showed a value of between $0 and $350,000 (R. 123; 134-135; 145-146).

The Trustees further produced evidence that the personal property was worth, for the years concerned, little or no value (R. 135-136); or $12,000 (R. 122). The taxing authorities produced no independent evidence as to value, but relied solely upon the testimony of the Assistant Tax Collector. The grossly excessive nature of the over $1,000,000 assessment is immediately apparent, and was properly acted upon by the Referee and the District Court, and was correctly affirmed by the Circuit Court.

Both the Referee and the District Judge found that the taxes claimed were, except to the amount allowed, excessive, and this finding is amply supported by the evidence as well as by the failure of the taxing authorities to produce any independent evidence as to value.

The determination of the weight to be given to the evidence on value is peculiarly within the fact finding province of the Referee especially when adopted by the District Court. It is fundamental bankruptcy law—overlooked by Appellants—that the determination of the Referee, when upheld by the district court is entitled to every reasonable presumption in its favor. *In Re: Murray,* 92 F.2d 612 (CCA 7, 1937); *In Re: Rafds Enterprises,* 297 F.2d 505 (CCA 7, 1962); *United States vs. 44.00 acres of Land,* 234 F.2d 410 (CCA 2, 1956) Cert. Den.; Rule 52(a) F.R.C.P.; *Stonega Coke and Coal Co. vs. Price,* (CCA 4, 1939), 106 F.2d 411, Cert. Den.; 308 U.S. 618, 60 S. Ct. 263, 84 L.Ed. 516; *Transportation Insurance Company*

vs. Hamilton, (CCA 10, 1963) 316 F.2d 294. Remington on Bankruptcy (6th Ed. Vol. 8, p. 334), and the many cases therein cited.

State law clearly has nothing to do with the weight which Rule 52 F.R.C.P. requires to be given to the determinations of the Referee when accepted by the District Court. *London vs. Trortino Bros., Inc.,* (CCA 4, 1962) 301 F.2d 116.

The Referee, in his proposed order forwarded to the District Judge, included a finding that action was taken "in consideration of all the facts, including but not limited to the findings by the Referee and Special Master, approved by the Court, that the taxes levied and claimed by the taxing authorities were excessive and improperly levied except with respect to the amounts herein allowed" (R. 60-61). This finding was incorporated by the District Judge in his order (R. 155-156).

This finding, and the opinion of the District Court (R. 150) make it clear that the Referee and the District Court found that the valuation placed by the taxing authorities upon the old hotel was excessive and the proportion by which the claims were reduced shows the extent of the overvaluation.

The taxing authorities made no objection to the form of this order, nor did they make any motion to amend the findings, in accordance with Rule 52(c) F.R.C.P. The Referee's action and the findings

quoted above, as well as in the transcript of the evidence heard by the Referee, reflect the finding that the valuation of the property was excessive in proportion to the amount by which the Referee reduced the tax claims. If the taxing authorities had any objection to the form of the findings or order, they should have made it known to the Referee It is too late to make this complaint now. *Kennedy vs. United States,* (CCA 9, 1940) 115 F.2d 624.

> "Concurrent findings of fact by the Referee in bankruptcy and district judge will not be set aside on appeal on anything less that demonstration of plain mistake." *In Re: Borman & Co.* (CCA 6, 1965) 343 F.2d 125.

There has been no mistake in this case.

The opinion of the District Court makes it abundantly clear that the Court and the Referee reduced the taxes because the valuations asserted by the taxing authorities were excessive. The district court's opinion (Appendix A hereto) expressly so states, in the following languag :

> "Three issues are presented for determination: (1) whether the reorganization Court has jurisdiction to examine and determine the amount of legality of the taxes assessed against the debtor; (2) whether the assessments against the debtor were grossly excessive and may be corrected, and; (3) whether the trustees may at this time challenge the assessments . . ." (R. 150.)

"The Court is of the opinion that the referee acting as a special master proceeded upon credible evidence, indeed upon the far greater weight of the evidence, to make an equitable readjustment of the tax claims, which were grossly excessive as well as arbitrary.

"From the record it is abundantly clear that the assessments of the property violated the 'reasonable cash market value' directions of the Texas Constitution and its statutes because:

(a) They were made upon an arbitrary basis ignoring cash market value; they were confused with assessors' formulas which plainly had little relation to actual value.

(b) They departed so far from actual cash value that the discrepancy could not be attributed to differences of opinion which might exist between reasonable men.

(c) They would plainly result in confiscation and great loss to the creditors if permitted to stand . . ." (R. 153.)

The substance of this case is the taxing authorities' attack upon power given to the bankruptcy Court by new Section 2-A of the Bankruptcy Act to "hear and determine . . . any question as to amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial tribunal of competent jurisdiction".

The taxing authorities contend (at page 5 of their application) that the meaning of the statute is that the appearance by the Trustees before the equalization board prevents the Referee from passing on the tax claim, and that failure to appear before that board with respect to the taxes for 1962, 1963 and 1964 deprived the bankruptcy Court of jurisdiction to pass on claims for those years. In other words, say Petitioners, the Referee could not pass upon 1965 taxes because they *had* been contested, and the Referee could not pass on 1962, 1963 and 1964 taxes because they *had not* been contested. This fallacy is at the heart of Petitioners' case; it was correctly rejected by all courts below and should, it is respectfully submitted, be rejected by this Court.

CONCLUSION.

The Referee, the District Court, and the Circuit Court have correctly disposed of this case. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE.

I hereby certify that a copy of this Brief has been furnished to attorneys of record for Appellants as follows:

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APPENDIX.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, AMARILLO DIVISION.

IN THE PROCEEDINGS FOR THE REORGANIZATION OF A CORPORATION—No. BK-2-96.

IN THE MATTER OF:
HERRING HOTEL CORPORATION
AMARILLO, TEXAS.

OPINION ON VALIDITY AND AMOUNT OF TAX CLAIMS.

This cause came on before me upon the trustee's Motion to Confirm the Findings and Recommendations of Special Master and Enter Order as Recommended, and upon the Petition to Review Referee's Order filed by the taxing units, City of Amarillo, Amarillo Independent School District, Amarillo College District and Amarillo Hospital District. The court has studied the record in this cause, heard arguments of counsel, and considered the memoranda of law filed by the trustees and the taxing units.

Three issues are presented for determination: (1) whether the reorganization court has jurisdiction to examine and determine the amount of legality of the taxes assessed against the debtor; (2) whether the assessments against the debtor were grossly excessive and may be corrected, and; (3) whether the trustees may at this time challenge the assessments.

1.

Any previous doubt as to a reorganization court's jurisdiction in this type of case should be set at rest by the July 5, 1966, amendment to section 2A of the Bankruptcy Act, 80 Stat. 270, 11 U.S.C.A. §11 (2A), 1966 Cumulative Annual Pocket Part. The Statute now provides that courts of bankruptcy are invested with such jurisdiction at law and in equity as will enable them to exercise original jurisdiction in proceedings under this title to

> Hear and determine, or cause to be heard and determined, any question arising as to the amount or legality of any unpaid tax, whether or not previously assessed, which has not prior to bankruptcy been contested before and adjudicated by a judicial or administrative tribunal of competent jurisdiction, and in respect to any tax, whether or not paid, when any such question has been contested and adjudicated by a judicial or administrative tribunal of competent jurisdiction and the time for appeal or review has not expired, to authorize the receiver or the trustee to prosecute such appeal or review.

This section of the Bankruptcy Act is applicable to Chapter X proceedings by virtue of 11 U.S.C. §502. This court, therefore, does have jurisdiction to pass upon the legality and amount of the taxes asserted against the debtor.

To hold otherwise would leave the debtor's estate open to whatever claim the taxing authorities choose to make, ignoring the necessities of reorganization, and giving the tax claimants a preference of treatment over other creditors nowhere justified by the Act or its purpose. 6 A Collier, Bankruptcy ¶9.07 at 182 (1965).

2.

Under Texas law, and as a general rule, grossly excessive assessments may be attacked and set aside. See *Warren Independent School District v. Southern Neches Corp.*, 405 S.W. 2d 100 (Tex. Civ. App. 1965), *error refused*, 404 S.W. 2d 809 (Tex. 1966); *Feldman v. Bevil*, 190 S.W. 2d 157 at 159 (Tex. Civ. App. 1945). Property is to be valued for purposes of taxation at its reasonable cash market value. Texas Constitution, art. 8 §1; *Rowland v. City of Tyler*, 5 S.W. 2d 756, 760 (Tex. Com. App. 1928); *Harlingen Independent School Dist. v. Dunlap*, 146 S.W. 2d 235, 237 (Tex. Civ. App. 1940) (error refused); *Whelan v. State*, 282 S.W. 2d 378, 380 (Tex. 1955).

The evidence submitted to the referee as special master shows that the reasonable cash market value of the Herring Hotel (land, building, and contents) for the years 1962 through 1965 was between $60,000 and $325,000. This range was established by the testimony of the several expert witnesses. Undisputed testimony was before the referee that the ancient hotel would require approximately a million

dollars and added land in order to modernize it for competition on a profitable basis with other hotel operations, and that the property was not saleable, even at a figure of $300,000. There was plausible testimony that the hotel furnishings, with the exception of some new furnishings added by the trustees, had no value.

The value of the real property for tax purposes was assessed between $846,000 and $598,000 and the value of the personal property was assessed at approximately $100,000 for the years 1962 through 1965. There was testimony seeking to support these assessments of this forty-year-old hotel property on the basis of square footage and replacement cost, and arbitrary reductions of that cost by percentage figures arrived at, for the most part, in an arbitrary fashion.

The court is of the opinion that the referee acting as a special master proceeded upon credible evidence, indeed upon the far greater weight of the evidence, to make an equitable readjustment of the tax claims, which were grossly excessive as well as arbitrary.

From the record it is abundantly clear that the assessments of the property violated the "reasonable cash market value" directions of the Texas Constitution and its statutes because:

(a) They were made upon an arbitrary basis ignoring cash market value; they were confused with

assessors' formulas which plainly had little relation to actual value.

(b) They departed so far from actual cash value that the discrepancy could not be attributed to differences of opinion which might exist between reasonable men.

(c) They would plainly result in confiscation and great loss to the creditors if permitted to stand.

3.

The referee was correct in not reducing the amount claimed for 1965 taxes. The trustees went before the Board of Equalization in 1965 and 1966, and took the matter no further. Therefore, the amounts of these assessments are final in these proceedings.

As to the prior years, however, the trustees were not involved in the assessment process for 1962, 1963, and 1964. The debtor's failure to appear before the Board of Equalization does not prevent the trustees, whose standing is that of a judgment creditor armed with process, from challenging these grossly excessive assessments, to protect the interests of the creditors.

CONCLUSION.

The trustees' Motion to Confirm Findings and Recommendations of Special Master and Enter Order As Recommended is accordingly granted, and the relief sought by the taxing units through their Petition to Review Referee's Order is denied. Settle order.

DONE AND ORDERED this 31st day of May, 1967.

EMETT C. CHOATE,
Senior United States District
Judge.

cc: Lumpkin, Watson & Smith

Gibson, Ochsner, Harlan,
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Underwood, Wilson, Sutton,
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